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No. [illegible] 142

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

MARIAN TIMMERMAN BYRD, by HARRY TIMMERMAN,
Father and Natural Guardian as Next Friend,
Petitioner,

v.

F. L. SEXTON et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on March 28, 1960.

OPINIONS BELOW.

The opinion of the District Court (R. 51) is unreported and is printed in Appendix B, infra, p. 42. The opinion of the Court of Appeals (R. 71) is unreported and is printed in Appendix A, infra, p. 15.

JURISDICTION.

The judgment of the Court of Appeals was entered March 28, 1960 (R. 99), infra, p. 43. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Is the Civil Rights Act limited to cases of racial discrimination, as held by the Court of Appeals, or does it also give a right of action to petitioner who claims to have been deprived of a federal right—equality of educational opportunity—by state officers acting under color of law?

2. Where Missouri provides free public schools, was there a denial of equal educational opportunity in violation of the Civil Rights Act when a local school board excluded petitioner, an eligible 17 year old student, for refusal to pay a mandatory $8 enrollment fee, and because of this refusal the school officials informed petitioner that she could not attend their school—the only free public school in Missouri petitioner was eligible to attend—and caused her arrest and confinement in jail for two nights and nearly two days without any attempt to prosecute, with the result that petitioner had to attend another Missouri school district and pay $200 tuition?

STATUTES INVOLVED.

Statutory provisions involved are 42 U. S. C., Sec. 1983 and Sec. 1985 (42 U. S. C. A., Sec. 1983 and Sec. 1985), and are printed in Appendix A, infra, p. 41.

STATEMENT.

Petitioner sued in the District Court for damages under the Civil Rights Act, alleging violations of Sections 1983 and 1985 thereof (Appendix A, infra, p. 41). District Courts have original jurisdiction of civil actions under the Civil Rights Act without regard to the citizenship of the parties or the amount in controversy, 28 U. S. C., Sec. 1343. The Court of Appeals denied relief on the ground that tort actions which do not involve a racial question are not within the scope of the Civil Rights Act.

Defendants are the Superintendent and Board of Education of Consolidated District No. 2 of Franklin County, Missouri. As such, they controlled and operated the Sullivan High School (R. 37, 53). The Missouri Constitution, Art. IX, Sec. 1 (a), 2 V. A. M. S., p. 439, provides that "the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years."[1] The schools have been established; and the Missouri courts have held that the right of children to attend such schools is a fundamental one for which no charge can be made. In *State ex rel. Roberts v. Wilson*, 221 Mo. App. 9, 297 S. W. 419 (1927), the court said:

[1] "Art. IX, Sec. 1 (a). A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law."

> "The right of children to attend the public school established in their district for them is not a privilege dependent upon the discretion of any one, but is a fundamental right, which cannot be denied, except for the general welfare . . . no right existed in the board, or anyone, to require payment of a tuition fee. . . ."

The Board and the Superintendent imposed a rule that all high school students in their district had to pay an enrollment fee of $8 as a condition precedent to enrollment (R. 49, 50, 53-54). The $8 was used for extracurricular activities such as basketball games and the annual May Day Festival (R. 44, 54). Attendance or participation in such activities was immaterial and had no effect on the pupil's school record or graduation requirements (R. 44-45).

Petitioner, a good student, paid the $8 enrollment fee for her junior year (R. 53, 19, 12) but declined to do so for her senior year. She contended that she was entitled to attend a free public high school without an enrollment charge (R. 13-14). The Superintendent told petitioner she could go elsewhere if she did not like their arrangement (R. 14). Petitioner could not go elsewhere; and pointed this out to the Superintendent, stating that "I lived here" (R. 14). There was no other high school in Missouri which petitioner could attend free of charge (R. 3, 13, 22, 24). When petitioner insisted upon attending the Sullivan School without paying the $8 enrollment fee, the Superintendent, with full approval of the School Board, complained to the Prosecuting Attorney of Franklin County and had her arrested for peace disturbance (R. 15-16, 30-31).

Petitioner was required to remain in jail for two nights and part of two days before being brought before a Magistrate for trial (R. 17). The charges against petitioner were nolle prossed by the Prosecuting Attorney (R. 16, 22-23).

26-27). No attempt was made to prosecute petitioner (R. 27).

Petitioner's arrest and confinement received wide publicity, and according to petitioner and her parents had a serious effect upon her (R. 17, 23, 25).

Petitioner made no further attempt to attend the Sullivan School and went to another public high school located in another Missouri School District where, as a non resident, she was required to pay $200 tuition (R. 16, 17). Prior to this, petitioner attempted to attend a public high school in St. Louis where her grandmother lived; but was told by the school officials that since her residence was in another County and she lived with her parents, she could not attend a St. Louis school without paying tuition of $400 (R. 17, 21).

The case was tried to the District Court without a jury. The court assumed, without deciding, that the School Board was without authority to impose the enrollment fee; but held that petitioner could not recover because she had not proved that the officials were motivated to act as they did by reason of her membership in some class or group which the United States had determined to protect, and had failed to establish a discrimination between persons of classes of persons (R. 55-56, infra, p. 42).

The Court of Appeals affirmed for different reasons, making no reference to the District Court's opinion, except to assume as did the District Court "that the defendants were without power to impose or to collect the fee." (R. 80) The Court of Appeals noted (1) that the Civil Rights Act does not apply to actions by individuals as such; and (2) that petitioner did not claim that the Missouri Constitution operated as a violation of Federal civil rights, but rather that the School Board's actions were unlawful under the Missouri Constitution. Principally, however, the

Court held that since the instant case "touches upon the educational process . . . another review of pertinent cases under these [Civil Rights] statutes . . . is indicated and might be helpful here." (R. 83) From this review, and its own reasoning, the court concluded that there is no right of recovery for damages under the Civil Rights Act unless the aggrieved is a Negro or a racial question is involved. Petitioner is white and is now married to a white member of the Armed Services (R. 12). There is no issue of race involved.

Concluding, then, that the Supreme Court and the Courts of Appeals in other Circuits have construed the Civil Rights Act to have a limited application, the court ruled the following:

1. The history of the Civil Rights statutes shows that they were adopted for a particular purpose—to help former Negro slaves in their new-found freedom—under turbulent circumstances; and that "statutes formulated in troubled times and enacted in haste are to be interpreted broadly only with caution" (R. 88). Since the statutes have received such limited recognition in the courts, particularly the "dim view" thereof expressed by the Supreme Court, there is little precedent for petitioner's action here (R. 91-92).

2. While the Third Circuit in *Picking v. Pennsylvania Railroad Company*, 151 F. 2d 240 (1945), has taken a contrary view (R. 93), the general attitude of the Federal Courts under the Civil Rights Act has put such a "gloss" on the statutes as to confine them to a "narrow area . . . which the plaintiff's case does not reach. At least we so interpret the statutes . . . until the Supreme Court tells us otherwise" (R. 96).

REASONS FOR GRANTING WRIT.

1. The Court of Appeals held that because petitioner's tort action does not involve racial discrimination, the Civil Rights Act is inapplicable. To reach this conclusion the court relied upon decisions of this court which are immaterial and irrelevant to a civil action for damages of the instant nature. The cases relied upon by the Court of Appeals fall into four general categories: (1) Refusals by this court to permit federal equitable intervention where State Court proceedings had already begun; (2) Cases involving interpretation of a state statute which the State Court had not yet construed; (3) Cases involving the criminal sections of the act; and (4) Cases where the violation complained of was committed by an individual, as distinguished from a state official acting under color of law. None of these decisions gives the Civil Rights Act the limited construction reached by the Court of Appeals in the instant tort case.

(a) *Cases involving equitable interference in state proceedings already under way.*

The Court of Appeals denied relief to petitioner principally on *Stefanelli v. Minard*, 342 U. S. 117, 72 S. Ct. 118 (1951) and *Douglas v. Jeannette*, 319 U. S. 157, 163, 63 S. Ct. 877. These decisions, however, involve equitable actions. Relief under the Civil Rights Act was withheld solely because this court declined to upset "the proper balance between the states and the federal government in law enforcement". The "proper balance" there referred to was the exercise of discretion as a matter of equity in a direct interference with the administration of a state criminal case already begun. This has nothing to do with the tort liability involved in the instant case, where all the damage that could possibly be done is completed, where no state case has been filed, and where no equitable relief against

state officers is sought or could be of any value to petitioner, if granted.

Stefanelli carefully points out that "we have withheld relief in equity even when recognizing that comparable facts would create a cause of action for damages" (342 U. S., l. c. 122). And in footnote 12 of that opinion (l. c. 124) this Court noted two cases—from the 6th and 3rd circuits respectively—where tort claims under the Civil Rights Act were upheld. There is no attempt in the instant case "to deprive state courts of their authority to enforce their own laws," which was the sole basis for the denial of relief in *Stefanelli* and similar cases relied on by the court below.

(b) *Defendants here were state officers acting under color of law.*

The court has misinterpreted *Collins v. Hardyman*, 341 U. S. 651, 71 S. Ct. 937 (1951), being apparently of the opinion that the conduct of the school of officials in the instant case was merely that of indiyiduals. This conclusion is not as clear as it might be from the opinion, but the court's reliance upon the *Hardyman* case would seem to be pointless, unless the court believed that the conduct complained of was that of individuals, rather than that of state officials. In the *Hardyman* case this Court said:

> "The complaint makes no claim that the conspiracy or the overt acts involved any action by state officials, or that defendants even pretended to act under color of State law" (71 S. Ct. 939).

In the instant case there is no question that the defendants were state officials acting as such. They themselves have never contended anything else. In *School District of Oakland v. School District of Joplin*, 340 Mo. 779, 102 S. W. 2d 109, 110 (1937), the Missouri Supreme Court held that school officials are state officers:

> "School districts . . . form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally entrusted governmental function of imparting knowledge to the youth of the state . . . ".

Missouri's definition of state officers cannot be ignored as the Court of Appeals seems to have done here.

And in *United States v. Classic*, 313 U. S. 299, 326, 61 S. Ct. 1031, 1043 (1941), this Court said:

> "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law."

Clearly the defendants in the instant case were state officials acting under color of state law, bringing their conduct squarely within the provisions of the Civil Rights Act.

(c) *The challenged rule has already been construed by the Missouri Courts and held to be illegal; so there is no occasion to withhold relief, on that ground, as the Court of Appeals did.*

The Court of Appeals relied on *Harrison v. N.A.A.C.P.*, 360 U. S. 167, 79 S. Ct. 1025 (1959), which withheld relief because no opportunity had been given to the state courts to construe the challenged statutes. No comparable situation exists in the instant case. The Missouri Courts hold that any charge imposed by a local school board as a tuition or enrollment fee, no matter how small and no matter how noble or worthwhile the motive therefor, is illegal, *State ex rel. Roberts v. Wilson*, 221 Mo. App. 9, 297 S. W. 419 (1927). In other words, what defendants did here was a violation of state law.

However, that does not make it any the less a violation of a federal right; because the violation was a denial of

equal educational opportunity. The barrier here to equal educational opportunity was a financial one. When petitioner refused to pay the enrollment fee, the school officials caused her to be arrested and held in jail for two nights and most of two days (R. 15-16, 17, 55). There seems to be no question that the arrest and imprisonment were illegal. The school officials made no effort to prosecute and the charge against petitioner was dismissed (R. 27, 55). As a result, petitioner was required to pay substantial tuition at another high school in Missouri, since the Sullivan school was the only one she could attend without charge in that state (R. 3, 13, 22, 24).

While Missouri has no obligation to provide high school education, once it does so the educational opportunity thus offered becomes "a right which must be made available to all on equal terms." *Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 691 (1954). A financial barrier can be just as great a deterrent to equality of educational opportunity as a racial barrier. To some families, an $8 barrier could well be the difference between going to high school or not going. Moreover, once the principle is established that school districts may capriciously charge whatever they like as an enrollment fee for a free public high school, the door is open for any and all kinds of such charges.

Furthermore, in the instant case the school officials admitted that the charge had nothing to do with the pupil's standing or effect upon graduation requirements (R. 44). The enrollment fee was for such things as attendance at basketball games, subscription to the school paper and the annual May fete (R. 44, 45). If such activities are essential to the school curriculum, then they should have been included in the school program as such, which petitioner was entitled to receive free of charge. If they were not essential, as the school officials here concede, then making

their payment a prerequisite to obtaining the free high school education offered elsewhere in Missouri, is even more clearly a denial of equal educational opportunity.

It is well established that educational opportunity must be equal on a state wide basis, *State ex rel. Gaines v. Canada*, 305 U. S. 337, 59 S. Ct. 232, 236 (1938). In other words, one Missouri school district cannot impose a compulsory enrollment fee while others do not.

Nor does the fact that petitioner could have saved money by paying the $8 fee demanded rather than the $200 tuition she had to pay elsewhere, have any significance. The same argument was made in the *Gaines* case and rejected by this Court; namely that it would have been cheaper for a negro to have accepted the offer to have his law school tuition paid in full in a school outside his own state.

The question presented here is a simple one. May school officials of one Missouri district charge an $8 enrollment fee for a high school education generally available elsewhere in Missouri at no cost to the pupils? We submit that this question must be answered in the affirmative, and that petitioner clearly has a cause of action under the Civil Rights Act.

For the purposes of its opinion the Court of Appeals assumed that the school officials were without power to impose or collect the fee in question. The court could hardly have reached any other conclusion, as its opinion seems to concede (footnote 11, R. 80). However, the court reasoned from this, incorrectly we think, that since the enrollment charge was illegal under the Missouri Constitution and petitioner did not attack the validity of that Constitution that it "might" find that the "right asserted by plaintiff is not one secured by the Fourteenth Amendment" (R. 82). The court, however, made no such finding. Petitioner is well aware that violation of state law does

not in itself give rise to an action under the Civil Rights Act.[2]

In *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 63 S. Ct. 1178 (1943), this Court held that a rule of a local school board which required a compulsory flag salute, was a violation of a federal right. We submit that the rule of the local school board in the instant case is just as illegal as the one involved in *Barnette*.

2. At least five other circuits are in conflict because these circuits have specifically held that the Civil Rights Act is applicable to tort actions not involving racial discrimination.

The opinion below is contrary to decisions of at least five other circuits, plus one prior decision of the Eighth

[2] In its brief in the Court of Appeals, petitioner stated, *inter alia*, the following:

"In trespassing upon plaintiff's right to equal educational opportunity, namely, a free high school education, defendants deprived plaintiff of one of the 'rights, privileges and immunities secured by the Constitution.' In *McShane v. Moldovan*, 172 F. 2d 1010, 1020 (C. A. 6, 1949), the court said that the Civil Rights act 'is applicable when and only when someone is deprived of a federal right by that action. The fact that it is also a violation of state law does not make it any the less a federal offense punishable as such.'"

And petitioner's reply brief stated, *inter alia*, the following:

"(2) Plaintiff's right to a free public education has been violated by defendants in imposing the $8 charge. Defendants' brief, p. 12, contends that violation of state law is not sufficient to bring a case within the protection of the Civil Rights Act. We agree, but are puzzled as to why the subject is even mentioned, since plaintiff's principal brief, pp. 17-22, said precisely the same thing, citing *inter alia*, *Mueller v. Powell*, 203 F. 2d 797, 800, C. A. 8 (1953), in which this Court said:

'. . . the problem is not whether state law has been violated but whether the inhabitant of a state has been deprived of a federal right by one who acts under color of any state law.' Again, it would appear that defendants do not grasp our position. Which is that a federal right was violated by defendants, state officials acting under color of state law, in denying plaintiff equal educational opportunity and equal protection of the laws."

Circuit itself.[3] Among the decisions which are contrary to the instant case are:

(a) *Picking v. Pennsylvania Railroad Company*, 151 F. 2d 240 (1945). The Court of Appeals acknowledged this conflict (R. 93).

(b) *Bottone v. Lindsley*, 170 F. 2d 705, 605 (C. A. 10, 1948), which held that the Civil Rights Act gives "a right of action sounding in tort, to every individual whose Federal rights are trespassed upon by any officer acting under pretense of State law".

(c) *McShane v. Moldovan*, 172 F. 2d 1016 (C. A. 6, 1949), which held that a complaint charging state officers with subjecting plaintiff to a fraudulent trial in a state court stated a cause of action in tort for a violation of the Civil Rights Act.

(d) *Wakat v. Harlib*, 253 F. 2d 59 (C. A. 7, 1958), which upheld a judgment of $15,000 in a tort action brought under the Civil Rights Act based upon a police classification having to do with criminal investigations. The court said (l. c. 64):

> "Discrimination based upon a classification created by the police is as much within the condemnation of the Civil Rights Acts as discrimination based on a classification derived from color, race or religion."

Language more flatly contrary to the instant decision could scarcely be found.

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[3] The instant opinion has left the status of Civil Rights cases in the Eighth Circuit confused, to say the least. In *Mueller v. Powell*, 203 F. 2d 797 (1953), that court, speaking through the late John Caskie Collett, Circuit Judge, held that the Civil Rights Act gives an action in tort for a deprivation of due process by state officers. While the instant opinion refers to the *Mueller* case, it makes no attempt to distinguish the holding or to overrule it.

(e) *Lewis v. Brautigam*, 227 F. 2d 124 (C. A. 5, 1955), which held that a complaint in tort against two deputy sheriffs for surreptitiously removing plaintiff from a County jail to keep him from conferring with his counsel stated a cause of action under the Civil Rights Act.

(f) *Refoule v. Ellis* (D. C. Georgia, 1947), 74 F. Supp. 346, granted a temporary injunction restraining police officers from unlawfully arresting plaintiff where he had been subjected to unlawful arrests on several previous occasions.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 16,056

Marian Timmerman Byrd, by Harry Timmerman, Father and Natural Guardian, as Next Friend, Appellant, vs. F. L. Sexton, et al., Appellees.	Appeal from the United States District Court for the Eastern District of Missouri.

[March 28, 1960.]

Before SANBORN, VAN OOSTERHOUT and BLACKMUN, Circuit Judges.

BLACKMUN, Circuit Judge.

This action, brought under 42 U.S.C. §1983 and §1985, concerns alleged civil rights violations committed in connection with the imposition of an $8.00 annual high school "enrollment fee"[1] which plaintiff, as a pupil, refused to pay for the school year 1955-56. Jurisdiction is based on

[1] In the testimony the fee is variously described as an "enrollment fee", an "activities fee", an "incidental fee", and a "text book and activity fee." We place no particular significance on any of these appellations.

28 U.S.C.A. §1343.[2] The case was tried to the court without a jury and judgment was entered dismissing the action with prejudice.

The suit was instituted March 26, 1956. Plaintiff Marian Timmerman was then 17 years of age and unmarried.[3] She had completed her freshman and sophomore high school years at Hancock High School in Lemay, St. Louis County, Missouri, and, beginning some time in 1954, she and her parents took up residence on a rural route in Washington County, Missouri. Their home there was about 10 miles southeast of the City of Sullivan in the adjoining Missouri County of Franklin. Marian attended Sullivan High School as a junior during the school year 1954-55. This was under an arrangement, in effect for some years, between the school officials of the Washington County district and the Board of Education of Consolidated District No. 2, Franklin County, whereby students living in a certain area (where plaintiff resided) of Washington County could attend high school in Sullivan rather than in Potosi, some 25 miles away.[4] Tuition and, beginning in September 1954, transportation costs were charged by the Consolidated District to the Washington County District and paid by the latter, and the Consolidated District in return provided the school facilities, instruction and bus transportation.

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[2] As that statute read prior to the additions, of no consequence here, effected in 1957 by Public Law 85-315, Part III, §121, 71 Stat. 637.

[3] Plaintiff later married and became known as Marian Zimmerman Byrd. The caption of the case was duly amended.

[4] Methods of pupil assignment are also prescribed by statute in Missouri. Vernon's Annotated Missouri Statutes, 1949, Vol. 11, §165.253 and §165.257. (§165.253 was amended in minor particulars by Laws 1957, p. 481, §1). The Washington County-Sullivan arrangement, however, was the permissible product of negotiation rather than of statutory procedure. In view of this arrangement, there is no question in this case of the propriety of plaintiff's attendance at Sullivan even though she was a resident of Washington County.

Defendant F. L. Sexton is the Superintendent of Schools of the Consolidated District. The other defendants involved in this appeal are the members of the Board of Education of the District.[5]

The complaint has 2 counts. Count I is based upon §1983.[6] It claims violation by defendants of plaintiff's federal rights "under color of" defendants' official authority.[7] Count II is based upon §1985, presumably para-

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[5] Also originally named as defendants were two non-member officers of the Board and the Prosecuting Attorney and the Judge of the Magistrate Court of Franklin County. Motions to dismiss the action as to these 4 persons were made prior to or during the trial and were sustained. No appeal has been taken with respect to any of these defendants.

[6] §1983. "Every person who, under color of any statute, or ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] Count I contains allegations as to the facts of plaintiff's attempt to attend Sullivan High School at the start of the 1955-56 school year, the refusal by the defendants to permit plaintiff to matriculate without payment of an $8.00 enrollment fee, her request for information as to the basis of the fee, her offer to pay any part thereof that included school books, her arrest and incarceration, and the lack of prosecution and dismissal of the charge against her, and further alleges that:

"13. The above described actions and conduct of defendants, and each of them, were under color of their official offices and under color of the official authority vested in them by statutes, law and regulations of the State of Missouri; were done without legal cause or justification; were unlawful, wrongful and malicious; deprived plaintiff of her right to attend without charge a public school in the State of Missouri; deprived her of the equal protection of the laws and equal rights under the laws; and deprived her of her liberty unlawfully and maliciously in violation of the laws of the State of Missouri, all in violation of the rights, privileges and immunities secured to plaintiff by Amendment 14 of the Constitution of the United States.

"14. At all times herein defendants, and each of them, knew that no lawful cause or justification existed to prevent plaintiff

graph (3) thereof,[8] and alleges the corresponding conspiracy.[9] Actual and punitive damages are asserted under

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from attending public high school at Sullivan, Missouri. Defendants knew that they had no lawful cause or justification for causing the arrest of plaintiff and detaining her in jail for two nights and approximately two days in order to prevent her from attending said public high school.

"15. The aforesaid actions of defendants in preventing plaintiff from attending public high school at Sullivan, Missouri, and in causing her arrest and detention as aforesaid were not only illegal and unlawful, but were done with malicious and evil intent."

[8] §1985(3). "If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

[9] Specifically Count II alleges that

"4. At some date unknown to plaintiff but prior to September 12, 1955, defendants entered into a conspiracy to deprive plaintiff of the rights, privileges and immunities secured to her by the 14th Amendment of the Constitution of the United States and by the laws of the State of Missouri.

"5. In pursuance of said unlawful conspiracy, defendants, acting under color of their official offices and under color of the official authority vested in them by statutes, laws and regulations of the State of Missouri, illegally and unlawfully prevented plaintiff from attending the public high school at Sullivan, Missouri, and caused her to be arrested and detained in jail for a period of two nights and nearly two days.

"6. Also in pursuance of said unlawful conspiracy, defendants acting under the color of their official offices and under color of the official authority vested in them by statutes, laws and regulations of the State of Missouri, offered to drop the prosecution of peace disturbance charges against plaintiff, if she would agree not to attend said public high school at Sullivan, Missouri; although defendants well knew that plaintiff had a legal right to attend said public high school, and that

both counts. The answers are general denials and they contain denials, also, that plaintiff can bring any action against the defendants under §1983 or §1985.

So far as the record discloses, no issue of race is in this case.

There is little dispute about the essential facts. We review them in detail here only in an attempt to reproduce the atmosphere prevailing at Sullivan in September, 1955. As stated above, Marian first attended Sullivan High School as a junior during the school year 1954-55. For that year the $8.00 enrollment fee was charged to and apparently paid by all the high school's students, residents as well as non-residents and including Marian. This fee seemingly was a matter of some concern to Marian's father for during that school year he wrote letters to the Governor and others about the charge. He had also seen Sexton, and as early as September 9, 1954, Sexton had written Timmerman in response to a letter from him, that the fee included text books and work books used during the year, admission to 5 special assemblies, admission to all basketball games except the annual tournament, a copy of the monthly school paper, and admission to Junior and Senior class plays and the annual May Day Festival. The letter also said that if it were necessary for a student to purchase his own text books, they would cost more than the $8.00 fee.

Marian's record during the 1954-55 school year was good.

On August 22, 1955, a form letter was mailed by Sexton to Marian at her home and received by her the following

there is no other free public high school which plaintiff could attend without charge.

"7. The aforesaid actions of defendants in preventing plaintiff from attending public high school at Sullivan, Missouri, and in causing her arrest and detention as aforesaid were not only illegal and unlawful but were done with malicious and evil intent."

day. This contained enrollment information for the coming year and the requirements for graduation. It stated that the enrollment date for juniors and seniors was Thursday, September 1st, and for others Friday the 2nd; that, however, buses were to operate only on Friday; that junior and senior bus students would be accepted on Friday, if they had no transportation Thursday; that school opened Tuesday, September 6th; and that the enrollment fee for the high school was $8.00 and for the eighth grade was $2.50. The same letter was sent to all students who had attended the school the year before and made no distinction, as far as the fee was concerned, between resident and non-resident students or among any of them.

On September 2 Marian went to school by the bus. She stood in line to make out her class schedule. The teacher there asked for her receipt for the enrollment fee. She said she had no receipt and was sent to Mr. Sexton. Sexton told her that she could not attend school without paying the fee. She asked for an itemized statement and said she was willing to pay for her books. Sexton said that the books would cost more than the enrollment fee and that she would have to pay the fee. Marian had the money with her and was fully able to pay. The payment, however, was not made.

On Tuesday, September 6th, the first day of school, Marian again took the bus. She talked with the principal and said that she wanted to know where her $8.00 was going. She attended an assembly and then went to a class. She was sent from that class to Sexton's office. There she stated that this was a free public high school, that her home district had paid her tuition and bus fare and that she did not think she had to pay the enrollment fee. She then sat in Sexton's outer office the rest of the day. She rode the bus home.

The following day, September 7th, a bus did not stop for her and 2 other students. The 3 were taken to school

by Marian's mother. Again she went to a class; she was told that she was trespassing but stayed in the class. After that she went to another class and was then sent to Sexton's office where she sat until lunch and during the afternoon. On that day Sexton told Marian that even if she paid the $8.00 she could not come to that school. She went home by the bus.

That night Sexton called a special meeting of the Board of Education. The Board by formal and unanimous action determined that Marian "cannot be accepted as a student in the Sullivan High School for 1955-56" because she was not a resident of the district, because she "has refused to comply with the rules and regulations governing the school", and because she "has created a disturbance and interfered with the normal operation of the school and classroom work." A registered letter was sent by Sexton with the approval of the Board to Marian's parents on September 8th. This quoted the Board's minutes concerning that action. It also stated that "If Marian continues to appear on the campus or in the buildings it will be necessary to have her removed by an officer of the law." This apparently is the only communication, written or oral, between the Board or Sexton and Marian's parents. On Thursday and Friday, September 8th and 9th, Marian went back to school and sat in Sexton's office those two days without conversation with him.

On Monday, the 12th, she again went to the school by bus, attended a first hour class and a study hour and then was sent to Sexton's office where she sat. After lunch she went to a gymnasium class where she was not permitted to participate. She then went back to Sexton's office. Sexton felt that the situation "was having a certain effect on other students" and reported the matter to the Prosecuting Attorney. That afternoon the sheriff arrested Marian in Sexton's office for disturbance of the peace. He took her to his office in Union, Missouri. Marian attempted to

reach her father by telephone from Union but was unable to do so at first. She was taken to Magistrate Court where an Information against her for disturbance of the peace was read. She pleaded not guilty. Bond was set at $500. Marian was able finally to reach her father in late afternoon. No bond was posted and she remained in jail from late Monday afternoon until mid-morning Wednesday. Counsel for Marian was retained. He obtained a change of venue to Hermann, Gasconade County, Missouri. The case was dismissed there without prosecution and Marian was released.

There was publicity about these events and there are claims that this experience adversely affected Marian's disposition and nervous condition and thwarted her plans to enlist in the Women's Division of the Marine Corps.

Marian made no further attempt to attend school at Sullivan but went to Roosevelt High School in St. Louis for a few days and lived with her grandmother during that time. The officials there ascertained that her home was with her parents in Washington County and she was not allowed to continue. She finished the year back at Hancock High School in Lemay and paid tuition there.

There is some conflict in the record as to Marian's conduct while she was sitting in Sexton's office. She apparently mingled with the students as classes were changed and kept notes of conversations between office personnel and those who called at the office. There is conflict, too, as to whether on September 12th Marian took a small overnight bag to school; she and her mother deny that such a bag was taken and Sexton himself did not see one, but the arresting sheriff said she had one in her possession. Marian acknowledged that she had been warned that if she continued to come to the school she would be arrested for disturbance of the peace.

The fee in question went into the school district's incidental fund. Payments of expenses for the general opera-

tion of the school, other than teachers' salaries, were made from that fund. An enrollment fee had been charged in the Sullivan public school system for a number of years. It was in effect prior to the election of any of the defendant board members and prior to Sexton's appointment as superintendent. It had been raised during Sexton's administration from around $6.50 to $8.00 but it had been at $8.00 for the 1954-55 school year. Sexton was unable to break the charge down among the various items for which it was said to be imposed. There was no formal requirement that students attend the assemblies, the games, the plays, or the festival, or receive or read the school paper, and failure to do these things did not deprive a pupil of his eligibility for graduation.

The trial court, in reaching its decision that the plaintiff had failed to establish a cause of action under either §1983 or §1985, assumed, without deciding, that, as a matter of Missouri law, the school officials had no power to require the plaintiff to pay the fee. The court felt, however, that, in order to obtain relief under the civil rights statutes, the plaintiff "must show more than that the actions of the school officials in excluding her from high school and causing her arrest were unlawful under Missouri law" and that she must show "that they were motivated to act thus by reason of plaintiff's membership in some class or group of persons which the United States has determined to protect."

The question whether the $8.00 fee violates the "gratuitous instruction" mandate of Article IX, §1(a),[10] of the Missouri Constitution deserves mention initially. While we might entertain some doubts, under the record in this

[10] Section 1(a) "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law * * *"

case, about the fee's Missouri constitutional invalidity[11] and about the adequacy of the proof of its discriminatory application, its invalidity under state law is not an answer to the question whether plaintiff's federal civil rights have been violated. *Mueller* v. *Powell*, 8 Cir., 203 F.2d 797, 800. We therefore follow the example of the trial court and assume, for purposes of this opinion only and without passing upon the question, that the defendants were without power to impose or to collect the fee.

We might summarily regard this case as correctly decided below upon either of the following grounds:

1. That it is governed by this court's opinions handed down 18 years ago in *Love* v. *Chandler*,[12] 124 F.2d 785, and in *Blood* v. *Pearson*, 124 F.2d 787. These were actions for damages brought under what is now §1985 and §1986 of 42 U.S.C.A.[13] It was claimed that the defend-

[11] The imposition of a fee for tuition and essential equipment has been held to be prohibited by the corresponding "gratuitous instruction" language in Article XI, § 1, of the predecessor Missouri Constitution of 1875, even in the presence of most unusual facts. *State ex rel. Roberts* v. *Wilson*, 221 Mo. App. 9, 297 S.W. 419. See also *Moore* v. *Brinson*, 170 Ga. 680, 154 S.E. 141. On the other hand, the constitutional guaranty does not appear to be absolute, for it does not seem to be a bar to the collection, from the home district, of tuition for a non-resident pupil, under Vernon's Annotated Missouri Statutes §165.253 or §165.257, or from the pupil or his parent, as provided for by §165.257, if the district fails to pay. *Linn Consolidated District* v. *Painter's Creek District*, 356 Mo. 708, 203 S.W.2d 721, 724, explaining *State ex rel. Barnett* v. *School District*, 335 Mo. 803, 74 S.W.2d 30. Furthermore, one might question whether the Sullivan enrollment fee was for "instruction", in whole or in part, or whether games, plays, the school paper and the like, are only incidental to instruction and are fine items, so long as they are kept within reasonable bounds, in American high school life.

[12] Regarded as sufficiently in conflict with *Hardyman* v. *Collins*, 9 Cir., 183 F.2d 308, to warrant the granting of certiorari in that case, 340 U.S. 809, 71 S.Ct. 63. The *Hardyman* case was reversed by the Supreme Court, 341 U.S. 651, 71 S.Ct. 937.

[13] In prior compilations, §1983 is found as §43 of former Title 8 U.S.C.A., and as R.S. §1979, and §1985(3) is found as §47 (3) of Former Title 8 U.S.C.A., and as R.S. §1980.

ants, most of whom were officers or agents of the United States or of the State of Minnesota, had conspired to prevent, and did prevent, the plaintiff from having and holding employment under the Works Progress Administration. This court said, page 787 of 124 F.2d:

> "The appellant does not seek redress because the State of Minnesota is discriminating against him, or because its laws fail to afford him equal protection. * * * The appellant seeks damages because certain persons, as individuals, have allegedly conspired to injure him and have injured him by individual and concerted action. The wrongs allegedly suffered by the appellant are assault and battery, false imprisonment, and interference with his efforts to obtain and retain employment with the Works Progress Administration. The protection of the rights allegedly infringed and redress for the alleged wrongs are, we think within the exclusive province of the State."

The *Lore* case has been cited with approval in at least two later opinions of this court. *Moffett v. Commerce Trust Co.*, 187 F.2d 242, 247; *Brewer v. Harris School District*, 238 F.2d 91, 104.[14]

2. That it is governed by *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, decided 16 years ago. The plaintiff there brought his action, under the statutes now before us, for damages for alleged infringement of his civil rights. He claimed that the defendants, who were members of the Illinois State Primary Canvassing Board, in violation of state law, refused to file a certificate of plaintiff's nomination in the primary as one of 2 nominees of his party

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[14] For other cases in this circuit touching upon 1983 or 1985, see *Mueller v. Powell*, supra, 203 F.2d 797; *Tate v. Arnold*, 223 F.2d 782; *Norwood v. Parenteau*, 228 F.2d 148, cert. den. 351 U.S. 955, 76 S.Ct. 852, and *Brooks v. School District*, 267 F.2d 733, cert. den. 361 U.S. 894, 80 S.Ct. 180. *Cole v. U.S.*, 8 Cir., 131 F.2d 98, concerns the parallel criminal statute.

for the state legislature. The court held that the plaintiff's rights under the privileges and immunities, due process, and equal protection clauses of the Fourteenth Amendment were not offended, and said, pp. 6, 7 and 8 of 321 U.S.:

> "The protection extended * * * by the privileges and immunities clause * * * does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law * * * not every denial of a right conferred by state law involves a denial of the equal protection of the laws, * * * the unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

In the present case the claim is not that the Missouri Constitution itself operates as a violation of plaintiff's federal civil rights (a not uncommon situation typified by the segregation cases referred to below) but, instead, it is that the defendants' acts are unlawful under the Missouri Constitution, the validity of which is not attacked. Therefore, as in *Snowden* v. *Hughes*, p. 13 of 321 U.S., we might conclude that the right asserted by plaintiff "is not one secured by the Fourteenth Amendment and affords no basis for a suit brought under the sections of the Civil Rights Acts relied upon * * *."

Because, however, the Supreme Court, in the interval since the *Lane* and *Snowden* cases were decided, has further considered the statutes, because the segregation cases, *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 349 U.S. 294, 75 S.Ct. 753, and *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, have been stressed by the parties, because this case touches upon the educational process,

and because this court in *Brewer* v. *Hoxie School District*, 238 F.2d 91, 104, affirmed the granting of relief in a case in the field of education and cited §1985(3) "as affording additional support to the federal jurisdiction and the issuance of the injunction", we feel that another review of pertinent cases under these statutes, particularly those of recent years, is indicated and might be helpful here.

We necessarily begin with the segregation cases. We recognize that the education of children is one of the fundamental and deep concerns of free men. And we are fully aware of the importance of education in the lives and opportunities of the youth of our nation. We heartily share with the Supreme Court its observation made, now some five and one-half years ago, in *Brown* v. *Board of Education*, supra, p. 493 of 347 U.S.:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

We note also the reaffirmance of the Brown holding and the court's adherence to its stated policy in the later case of *Cooper* v. *Aaron*, 358 U.S. 1, 19-20, 78 S.Ct. 1401, 1410, where it was said:

"It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under the law. The Fourteenth Amendment embodied and emphasized that ideal. * * * Since the first Brown opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under the law is thus made a living truth."

It is perhaps initially to be observed that the language quoted from *Brown* implies certain limitations. Neither that language nor the holding itself prescribes as a *federal* right the availability of education, let alone free education, through state facilities. The opinion stands for the proposition that only "where the state has undertaken to provide it", the opportunity of an education "is a right which must be made available to all on equal terms."

We therefore look to §1983 and §1985 to ascertain whether they are sufficiently broad to embrace an action such as this. The answer to this question has never been an apparent or particularly easy one. The statutes at first reading appear to be broad and inclusive in their language and directed to remedies for the deprivation of "any rights, privileges or immunities secured by the Constitution and laws" or of "any right or privilege of a citizen of the United States." Nevertheless, after what

we trust is a sufficiently exhaustive review of the decided cases, both in the Supreme Court and in the lower Federal courts, we conclude, as was done in the *Lore*, *Blood* and *Snowden* cases, that these sections afford no relief for the plaintiff's alleged injuries here. We reach this result after consideration of the following:

A. The history of the statutes. These sections came into the present Code from the old Revised Statutes, §1979 and §1980, respectively, and those in turn had their origin in the early Civil Rights Acts, particularly the Act of April 20, 1871, 17 Stat. 130,[15] adopted soon after the Civil War to implement the then recent Thirteenth, Fourteenth and Fifteenth Amendments. They were thus designed for a specific purpose. This history and this purpose have been noted and emphasized by the Supreme Court, *Hague v. C. I. O.*, 307 U.S. 496, 609-10, 59 S.Ct. 954; *U. S. v. Williams*, 341 U.S. 70, 73 et seq., 88, 71 S.Ct. 581; *Collins v. Hardyman*, 341 U.S. 651-656, 71 S.Ct. 937; *Stefanelli v. Minard*, 342 U.S. 117, 121, 72 S.Ct. 118; see Mr. Justice Roberts, dissenting, in *Screws v. U. S.*, 325 U.S. 91, 140 et seq., and by this court in *Lore v. Chandler*, where it was said, p. 786 of 124 F.2d:

> "The statutes which the appellant seeks to invoke were passed shortly after the Civil War to aid in the enforcement of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment prohibiting State action the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without due process or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. * * * The statutes were

[15] See also the Act of April 9, 1866, 14 Stat. 27, the Act of March 2, 1867, 14 Stat. 484, and the Act of May 31, 1870, 16 Stat. 140.

> intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of the United States. * * * The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States * * * did not have the effect of taking into federal control the protection of private rights against invasion by individuals. * * * The protection of such rights and redress for such wrongs was left with the States. * * *" (Citations omitted)

Inasmuch as the statutes were designed for a particular purpose, one might reasonably expect that, when the tension of those difficult times had somewhat relaxed, the use of the statutes would lessen. That, until recent years at least, seems to have been a fact. The 1st Circuit has noted this in *Francis* v. *Lyman*, 216 F.2d 583, 586, in speaking of §1983:

> "As is well known, the statute in question was originally enacted by the Congress in the turbulent days of Reconstruction. For many years the enactment remained on the books, in a somewhat dormant state; and the Congress has never taken occasion to revise or modify the statutory language substantially. It may be that this is to be explained by the fact that until recent years resourceful plaintiffs' lawyers have not sought, in a significant number of cases, to invoke the application of the Civil Rights Act in situations far removed from those which were no doubt predominantly in the minds of the members of Congress in 1871 when they first enacted the legislation. At any rate, the Congress has sub silentio retained the act in effect, as it now appears, without substantial change, in 42 U.S.C.A. §1983."

So, also, has the Supreme Court, *Collins* v. *Hardyman*, supra, p. 656 of 341 U.S.; and see Mr. Justice Jackson's

dissenting remark in *Cassell* v. *Texas*, 339 U.S. 282, 303, 70 S.Ct. 629.

We are impressed here with the particular history and origin of these sections, with their specific original purpose and with their dormancy until recent years. All these are narrowing considerations and, in the light of the other factors hereinbelow discussed, we regard them as significant.

B. The atmosphere under which the statutes were enacted. The 1st Circuit in *Francis* v. *Lyman*, supra, p. 586 of 216 F.2d, described that time as "the turbulent days of Reconstruction." The Supreme Court, after detailed study of the Congressional records, said in *U. S.* v. *Williams*, supra, p. 74 of 341 U.S., with respect to the parallel criminal sections:

> "The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues. The sections before us are no exception. Although enacted together, they were proposed by different sponsors and hastily adopted. They received little attention in debate. * * *"

and, with respect to 1985, in *Collins* v. *Hardyman*, p. 656-7 of 341 U. S.:

> "This statutory provision has long been dormant. * * * The Act was among the last of the reconstruction legislation to be based on the 'conquered province' theory which prevailed in Congress for a period following the Civil War. * * * The Act, popularly known as the Ku Klux Act, was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon

realized when its execution brought about a severe reaction."

and, in *Stefanelli v. Minard*, supra, p. 121 of 342 U. S.:

> "These considerations have informed our construction of the Civil Rights Act. This Act has given rise to differences of application here. Such differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning."

See, also, Mr. Justice Roberts, dissenting, in *Screws v. U. S.*, supra, p. 140 of 325 U. S.

It would seem logically to follow that statutes formulated in troubled times and enacted in haste are to be interpreted broadly only with caution.

C. The statute's limited recognition in the courts: In spite of their long dormant state, § 1983 and § 1985 lately have been the subject of extensive litigation. All the cases, perhaps, cannot be reconciled and there have been strong and frequent dissents. A close examination of the cases, however, discloses that in practice the statutes have received a narrow interpretation.

1. In the United States Supreme Court. Although the Supreme Court has made passing references to these sections as providing relief in appropriate situations,[16] and in fact has used them as a basis for granting equitable relief,[17] the instances of Supreme Court approval of dam-

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16 *Ray v. Blair*, 343 U. S. 214, 227, 72 S. Ct. 654; *O'Sullivan v. Fehr*, 233 U. S. 318, 323, 34 S. Ct. 596; see Mr. Justice Frankfurter's dissenting remarks in *Burns v. Ohio*, 360 U. S. 252, 258, 79 S. Ct. 1164.

17 *Hague v. C. I. O.*, 307 U. S. 496; *Brown v. Board of Education*, supra; *Bolling v. Sharpe*, supra; *U. S. v. Raines*, [illegible] U. S. [illegible] S. Ct. [illegible] (decided February 29, 1960).

age actions brought under these statutes have been comparatively few indeed, and appear to be restricted to situations involving deprival of the right to vote because of race.[18] On the other hand, actions under the civil rights statutes have not been fruitful in a number of varying circumstances. These include not only situations where perhaps one of the influencing factors was the absence of state authority,[19] but, as well, situations where color of state law or state authority was alleged or was apparent.[20] Furthermore, even where the Court felt that the

[18] *Myers* v. *Anderson*, 238 U.S. 368, 35 S.Ct. 932; *Nixon* v. *Herndon*, 273 U.S. 536, 47 S.Ct. 446; *Nixon* v. *Condon*, 286 U.S. 73, 52 S.Ct. 484; *Lane* v. *Wilson*, 307 U.S. 268, 59 S.Ct. 872; *Smith* v. *Allwright*, 321 U.S. 649, 64 S.Ct. 757, overruling *Grovey* v. *Townsend*, 295 U.S. 45, 55 S.Ct. 622; and see *Giles* v. *Harris*, 189 U.S. 475, 485, 23 S.Ct. 639.

[19] *Bowman* v. *Chicago & Northwestern Railway Co.*, 115 U.S. 611, 6 S.Ct. 192 (refusal of defendant to carry beer into Iowa because of a prohibitory Iowa Statute); *Corrigan* v. *Buckley*, 271 U.S. 323, 46 S.Ct. 521 (suit to restrain violation of agreement among property owners not to convey property to a negro); *Collins* v. *Hardyman*, supra, (damage action for the breaking up of a public meeting).

[20] *Carter* v. *Greenhow*, 114 U.S. 317, 5 S.Ct. 928 (damage action for refusal of defendant tax collector to accept in payment of taxes coupons tendered under an alleged contract with the State); *Pleasants* v. *Greenhow*, 114 U.S. 323, 5 S.Ct. 931 (same); *Hill* v. *Indiana Manufacturing Co.*, 176 U.S. 68, 20 S.Ct. 272 (suit to enjoin collection of taxes claimed to rest on patent rights); *Monge* v. *Peabody*, 212 U.S. 78, 29 S.Ct. 235 (damage action against the Governor and others for imprisonment during alleged insurrection); *Douglas* v. *Jeannette*, 319 U.S. 157, 63 S.Ct. 862 (suit by members of Jehovah's Witnesses to restrain threatened criminal prosecutions in state courts for violation of a city ordinance prohibiting solicitation without first procuring a license); *Snowden* v. *Hughes*, supra, (damage action for failure to certify plaintiff as a successful primary nominee); *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783 (damage action with respect to investigation by a committee of the California legislature); *Stefanelli* v. *Minard*, 342 U.S. 117, 72 S.Ct. 118 (action for injunction against the use in a state criminal proceeding of evidence claimed to have been obtained by an unlawful search by state police; and see *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 79 S.Ct. 1025, (action for declaratory judgment as to alleged unconstitutionality of state statutes, with jurisdiction retained until the state courts were given a reasonable opportunity to construe the statutes).

complaint established a case within the adjudicatory power of the federal courts under the statutes, or assumed that it did, it has been cautious in granting relief where to do so would interfere with state court proceedings (saving an exception where there is a "call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent"), *Douglas* v. *Jeannette*, supra, p. 163 of 319 U.S., or where "the proper balance between the states and the federal government in law enforcement" would be affected, see *Screws* v. *U. S.*, 325 U.S. 91, 108, 65 S.Ct. 1031, and *Stefanelli* v. *Minard*, supra, p. 121 of 342 U.S., or until every chance has been given the state courts first to construe the challenged state statutes, *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 79 S.Ct. 1025. These contingencies are perhaps illustrated by Mr. Justice Frankfurter's comment, concurring in *Snowden* v. *Hughes*, supra, p. 16 of 321 U.S.:

> "Our question is not whether a remedy is available for such illegality, but whether it is available in the first instance in a federal court. Such a problem of federal judicial control must be placed in the historic context of the relationship of the federal courts to the states, with due regard for the natural sensitiveness of the states and for the appropriate responsibility of state courts to correct the action of lower state courts and state officials."

The criminal law counterparts of §1983 and §1985, namely, 18 U.S.C. §241 and §242, and their respective predecessor statutes and other related laws, have encountered similar limitations in the cases. These hotly contested sections have generally been held available by the court to support prosecutions of conduct which interferes with rights that flow "from substantive powers of the Federal government."[21] At the same time, the criminal

[21] *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152 (conspiracy to intimidate citizens in the exercise of his right to vote); *U.S.*

statutes have been held to afford no room for prosecution of individuals for alleged violations of "rights which the Constitution merely guarantees from interference by a State."[22]

Waddell, 112 U.S. 76, 5 S.Ct. 35 (conspiracy and overt acts to interfere with a citizen's right to establish a claim under the federal homestead acts); *Logan v. U. S.*, 144 U.S. 263, 12 S.Ct. 617 (conspiracy to injure a citizen of the United States in the lawful custody of a U. S. Marshal); *In re Quarles and Butler*, 158 U.S. 532, 15 S.Ct. 959, and *Motes v. U. S.*, 178 U.S. 458, 20 S.Ct. 993 (conspiracy to intimidate a citizen in the free exercise of his right to inform for violation of a federal law); *Guinn v. U. S.*, 238 U.S. 347, 35 S.Ct. 926 (conspiracy to deprive negro citizens of the right to vote at a general election, the defense resting in the grandfather clause of a state constitution); *U. S. v. Mosley*, 238 U.S. 383, 35 S.Ct. 904 (conspiracy by election board officers to disregard precinct returns in a congressional election); *U. S. v. Classic*, 313 U.S. 299, 61 S.Ct. 1031 (alteration and false counting and certification of votes in a primary election); *U. S. v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101 (conspiracy of election officials to stuff a ballot box at an election for a U. S. Senator); *Screws v. U. S.*, 325 U.S. 91, 65 S.Ct. 1031 (police officers' arrest of negro for a state offense and his death by beating); *Williams v. U. S.*, 341 U.S. 97, 71 S.Ct. 576 (use of force by special police officer to obtain a confession from a suspect); see *Strauder v. West Virginia*, 100 U.S. 303 (constitutionality of a federal statute, related to the civil rights sections, authorizing removal of a criminal proceeding to Federal court when non-whites by state statute were not permitted to act as jurors) and *Ex parte Virginia*, 100 U.S. 339 (denial of habeas corpus to state judge in custody under Federal indictment charging him for refusing to select qualified negroes as jurors). But see, also, *U. S. v. Cruikshank*, 243 U.S. 476, 37 S.Ct. 407 (conspiracy statute held not sufficient to support an indictment in connection with the stuffing of a congressional primary election ballot box); *U. S. v. Bathgate*, 246 U.S. 220, 38 S.Ct. 269 (conspiracy statute held not to include a conspiracy to bribe voters at a general election), and *Neal v. Delaware*, 103 U.S. 370 (motion to quash indictment sustained where there was no showing that State intended its constitutional provision limiting selection of jurors, but antedating the Fifteenth Amendment, to remain effective thereafter).

[22] *Hodges v. U. S.*, 203 U.S. 1, 27 S.Ct. 6 (conspiracy to prevent negroes from working or carrying out contracts to labor); *U. S. v. Powell*, 212 U.S. 564, 29 S.Ct. 690 (conspiracy on the part of a mob which seized a negro from the custody of a sheriff and lynched him); *U. S. v. Wheeler*, 254 U.S. 281, 41 S.Ct. 133 (conspiracy to deprive citizens of their right to remit their residence in a particular state); *U. S. v. Williams*, 341 U.S. 70, 77, 71 S.Ct. 581 (conspiracy by special police officers to injure a citizen by beating him until he confessed to a theft). See *Virginia v.*

It seems to us, from all this, that the Supreme Court in its decided cases entertains a dim view toward expanding the interpretation and scope of the statutes in question, that it has construed them narrowly in the light of their initial purpose, and that there is little precedent for the plaintiff's action here. This lack of affection for the statutes has been noted by Mr. Justice Douglas, dissenting in *Martin* v. *Creasy*, 360 U.S. 219, 228, 79 S.Ct. 1034, and, more specifically, in *Irvine* v. *California*, 347 U.S. 128, 152, 78 S.Ct. 1014, where he says, by way of footnote:

> "The current hostility towards federal actions—both criminal and civil—under the civil rights laws is further evidenced by *United States* v. *Williams*, 341 U.S. 70; *Tenney* v. *Brandhove*, 341 U.S. 367; *Collins* v. *Hardyman*, 341 U.S. 651; *Whittington* v. *Johnston*, 201 F.2d 810, cert. denied, 346 U.S. 867; *Francis* v. *Crafts*, 203 F.2d 809, cert. denied, 346 U. S. 835."

2. In the lower Federal courts. It would serve no useful purpose to review here all the cases decided under the statutes. It is helpful, however, to note that in these courts similar tendencies of restriction and limitation are apparent.

Judge Magruder, concurring in *Cobb* v. *City of Malden*, 1 Cir., 202 F.2d 701, was initially troubled by the apparent breadth of § 1983, but observed, p. 706:

> "This is not the first time that a court has been perplexed by the apparently sweeping and unqualified language of the old Civil Rights Act. 8 U.S.C.A. § 43 seems to say that every person in official position, whether executive, legislative, or judicial, who under color of state law subjects or causes to be subjected any person to the deprivation of any rights secured by the Constitution of the United States shall be liable in

Ex parte Virginia, 100 U.S. 313 (where the same removal statute involved in *Strauder* v. *West Va.*, supra, was held not available where the exclusion of negroes on a criminal jury was not due to specific state statute, but if present at all, was due to individual acts); *U.S.* v. *Cruikshank*, 92 U.S. 542

damages to the person injured. * * * Reading the language of the Act in its broadest sweep, it would seem to make no difference that the conduct of the defendants might not have been tortious at common law; for the Act, if read literally, creates a new federal tort, where all that has to be proved is that the defendants as a result of their conduct under color of state law have in fact caused harm to the plaintiff by depriving him of rights, etc., secured by the Constitution of the United States.

"Fortunately, *Tenney* v. *Brandhove*, * * * has relieved us of the necessity of giving the Civil Rights Act such an awesome and unqualified interpretation."

He made further observations in speaking for the entire court in *Francis* v. *Luman*, supra, pp. 587-8 of 216 F.2d:

"When courts come to deal with a statute phrased in terms of such vague generality, they are faced with two possible alternatives: (1) They may give effect to the statute in its literal wording, and thus reach results so bizarre and startling that the legislative body would probably be shocked into the prompt passage of amendatory legislation. This seems to be the approach which the Third Circuit intended to take in its opinion in *Picking* v. *Pennsylvania R. R. Co.*, 1945, 151 F.2d 240. (2) The courts may refuse to regard the statute as an isolated phenomenon, sticking out like a sore thumb if given a strict, literal application; and upon the contrary may conceive it to be their duty, in applying the statutory language, to fit the statute as harmoniously as may be into the familiar and generally accepted legal background, and to confine its application, within reason, to those situations which might possibly have had the approval of the Congress if it had specifically adverted to the particular cases, bearing in mind the basic purposes which gave rise to the legislation in the first place. * * *

"Where the act has been invoked in situations which no doubt were a major concern of the Reconstruc-

> tion Congress—for instance, where members of a state board for the registration of voters have refused to permit the registration of a negro, acting under color of discriminatory state legislation—the Supreme Court has not been loath to impose tort liability upon such state officials under the Civil Rights Act. • • • But beyond such situations, it seems to be the tendency of the decisions to restrict the applications of the Civil Rights Act. • • •"

In areas where the statutes have been acknowledged to have application, it has nevertheless been held that they are not dominant. Thus, the statutes have been held to be subordinate to the principle of judicial immunity.[23] Further, this immunity has been held available for officials in quasi judicial or even other positions,[24] and a concept of qualified immunity has emerged with respect to municipal legislative officers.[25]

In the lower federal courts, too, one finds recognition of the tendency "to avoid the appalling inflamation of delicate state-federal relationships which undoubtedly would ensue" if the civil rights statutes were too broadly construed. *Francis* v. *Lyman*, 1 Cir., supra, p. 588

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[23] *Tate* v. *Arnold*, 8 Cir., 233 F 2d 782, 786; *Francis* v. *Lyman*, 1 Cir., 203 F 2d 800, cert. den. 346 U.S. 835, 74 S.Ct. 43; *Kenney* v. *Fox*, 6 Cir. 232 F 2d 288, 292, cert. den. 352 U.S. 855, 856, 77 S.Ct. 84; *Skinner* v. *Nebel*, 7 Cir. 242 F 2d 573, 575; *Larson* v. *Gibson*, 9 Cir. 267 F 2d 386-7.

[24] A few examples are *Kenney* v. *Fox*, 6 Cir., supra, (prosecuting attorney, attorney filing confinement papers and state hospital physicians); *Cauley* v. *Warren*, 7 Cir., 216 F 2d 74 (state's attorney, his assistant and grand jury foreman); *Stafford* v. *Superior Court*, 9 Cir., 272 F 2d 407 (sheriff); *Lance* v. *Compton*, 9 Cir., 239 F 2d 226, 231, cert. den. 353 U.S. 950, 77 S.Ct. 868 (police officers); *Dunn* v. *Gazzola*, 1 Cir., 216 F 2d 709 (police sergeant, reformatory superintendent and commissioner of correction); *Barnett* v. *Weimer*, 7 Cir., 208 F 2d 860, cert. den. 355 U.S. 858, 78 S.Ct. 87 (court appointed physician in commitment proceedings); *Hofman* v. *Holden*, 9 Cir., 208 F 2d 280, 300 (jailer and hospital superintendent); *Laughlin* v. *Rosenman*, D.C. Cir., 163 F 2d 855 (assistant to the President and Special Assistant Attorney General).

[25] *Cobb* v. *City of Malden*, 1 Cir., supra, p. 707; cf. 201 F 2d; *Nelson* v. *Knox*, 6 Cir., 256 F 2d 312, 315.

of 216 F.2d. And it is repeatedly observed that the statutes are not to be utilized, in the absence of a complete breakdown of law and order, *Downie* v. *Powers*, 10 Cir., 193 F.2d 760, 765, to provide a federal forum for the redress of private wrongs, or, to put it another way, that they do not have the effect of taking into Federal control the protection of private rights against invasion by individuals. *Love* v. *Chandler*, 8 Cir., supra, p. 786 of 124 F.2d, *Moffett* v. *Commerce Trust Co.*, 8 Cir., supra, p. 247 of 187 F.2d, *Shemaitis* v. *Froemke*, 7 Cir., 189 F.2d 963, *Bottone* v. *Lindsley*, 10 Cir., 170 F.2d 705, 707, cert. den. 336 U.S. 944, 69 S.Ct. 810. Instead, the protection of such rights and redress for such wrongs is left with the state.

In addition, the general attitude of the federal courts towards actions under these sections can be gleaned from the following: One's "subjection to the necessity of having to stand trial on an unfounded charge did not alone constitute a deprivation of any right, etc., secured by the Constitution of the United States." *Dunn* v. *Gazzola*, 1 Cir., supra, p. 711 of 216 F.2d. "The Civil Rights Acts were enacted to protect the civil rights of individuals, and not to discipline local law enforcement officers for acts that are later corrected. * * * The common law provides adequate actions for damages against errant law enforcement officials." *Jennings* v. *Nester*, 7 Cir., 217 F.2d 153, 155, cert. den. 349 U.S. 958, 75 S.Ct. 888. "The right not to have private individuals swear falsely in a state court is not a right secured by the Federal Constitution", *Bartlett* v. *Weimer*, 7 Cir., supra, p. 862 of 268 F.2d. "The right of employment, and its redress when invaded, is exclusively within the domain of the state. It is not a federal civil right." *Ferrer* v. *Fronton Exhibition Co.*, 5 Cir., 188 F.2d 954, 956. An allegation that "the defendants acted wilfully and maliciously * * * adds no strength to the complaint under" the Civil Rights Act. *Whittington* v. *Johnston*, 5 Cir., 201 F.2d 810, 812, cert. den. 346 U.S. 867, 74 S.Ct. 103.

These lower federal cases cited are only a sample. But they, quite naturally, display the same trends toward restriction and limitation of §1983 and §1985 as we feel are illustrated by the opinions of the Supreme Court which have been outlined in detail.

This review of the Supreme Court and other cases lends no encouragement to any theory that today's civil rights statutes afford the answer to plaintiff's claims. As was said, in *U. S.* v. *Williams*, supra, p. 81 of 341 U.S., "The uses to which a statute has been put are strong evidence of the ends it was intended to serve."

If we may use the figure of speech employed in *Francis* v. *Lyman*, 1 Cir., supra, p. 588 of 216 F.2d, our feel for the "gloss put upon the statute by the controlling decisions" leads us to the conclusion that the trial court's judgment dismissing the action was correct. This is so (1) because, as in *Snowden* v. *Hughes*, supra, plaintiff here claims no invalidity of state law or of state constitutional provision but at the most complains of acts said to be improper under the Missouri Constitution, (2) because, as in *Love* v. *Chandler*, supra, plaintiff's cause of action, if there be one, is for invasion of personal rights for which state laws and state forums provide the avenue of relief, and (3) because the decisions which have been promulgated, both before and since those cases were decided, seem to us clearly to outline a specific and narrow area of applicability of the statutes and one which the plaintiff's case does not reach. At least, we so interpret the statutes until the Congress broadens them or until the Supreme Court tells us otherwise.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Title 42, U. S. C., Sec. 1983. Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, U. S. C., Sec. 1985. (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX B.

Opinion of the District Court, Dec. 31, 1957.

I have given consideration to the briefs filed in this case after the conclusion of the presentation of the evidence, and I have determined that plaintiff has failed to establish a cause of action under Sec. 1983 or Sec. 1985 of Title 42, U. S. C. A. In reaching the conclusion that the complaint is legally insufficient, I have assumed both a state of facts most favorable to plaintiff's contention and, also, I have assumed that, as a matter of Missouri law, the school officials were without power to require plaintiff to pay the eight dollar enrollment fee. To show that she has been deprived of "equal protection of the laws" or "due process of law" *vis-a-vis* equal access to educational facilities, I believe plaintiff must show more than that the actions of the school officials in excluding her from high school and causing her arrest were unlawful under Missouri law; she must I believe, show that they were motivated to act thus by reason of plaintiff's membership in some class or group of persons which the United States has determined to protect. In reaching this conclusion I have found the opinion of the Court of Appeals for the 9th Circuit in *Adams v. City of Compton*, 239 F. 2d 226, 1956, helpful although not strictly in point. See, also, *Professor Corwin's discussion*, pages 1141-1170 of the *Annotated Edition of the Constitution, Sen. Doc. 170, 82nd Congress, 2nd Session.*

Since plaintiff has, in my opinion, failed to state a cause of action under Sec. 1983, her claim based upon conspiracy must also be rejected.

Please prepare Findings of Fact, Conclusions of Law and a separate Judgment for my approval.

(Signed) Geo. H. Moore,
United States District Judge

Dec. 31, 1957.

(Judgment.)

United States Court of Appeals
For the Eighth Circuit.

No. 16056. September Term, 1959.

Marian Timmerman Byrd, by Harry Timmerman,
Father and Natural Guardian,
as Next Friend,
Appellant,

vs.

F. L. Sexton, Gordon Mathias, Hugh Peterson, Joe Owens, Burlie Norris, Virginia Iams and Cyrus Dace.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

March 28, 1960.